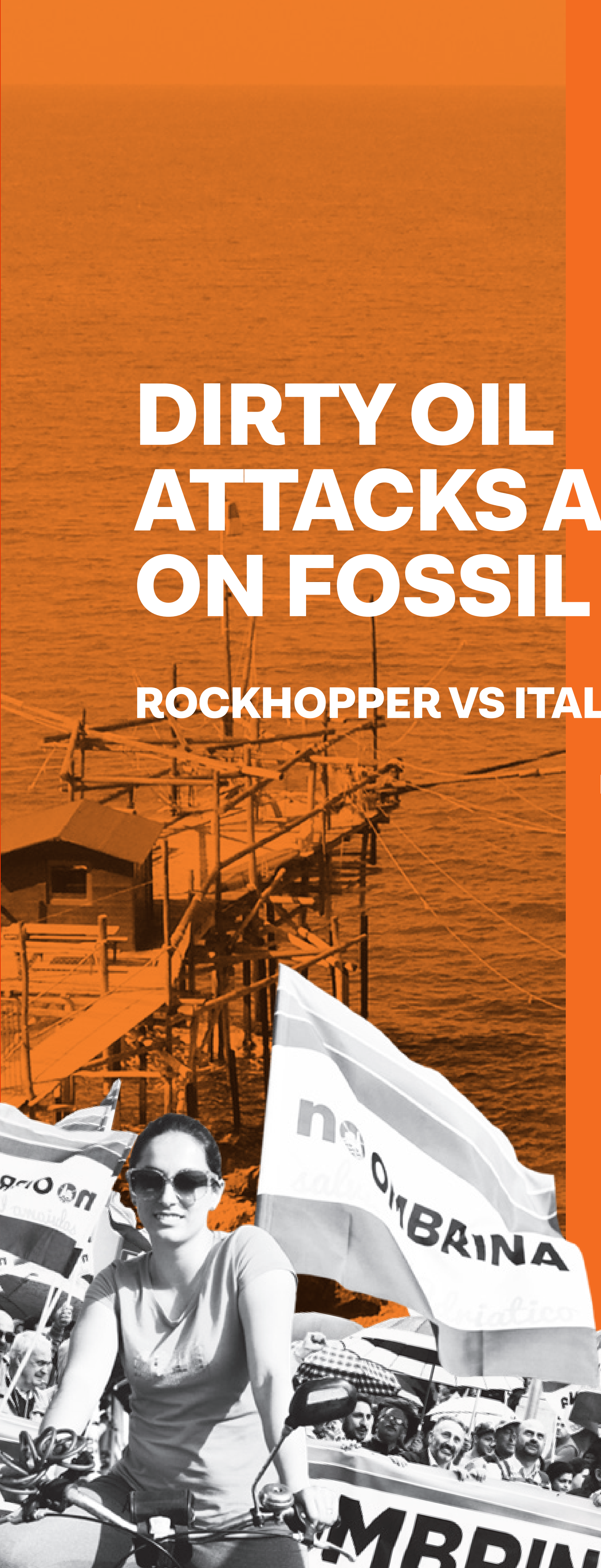


# DIRTY OIL ATTACKS ACTION ON FOSSIL FUELS

## ROCKHOPPER VS ITALY

Since 2017 UK-based oil and gas company Rockhopper Exploration has been suing Italy over the state's refusal to grant it a concession for oil drilling in the Adriatic Sea. The refusal came after the Italian Parliament banned all new oil and gas operations near the country's coast, amidst concerns regarding the environment, earthquake risks, local fisheries, and tourism as well as strong opposition from local residents. Rockhopper is claiming up to US$350 million in damages – more than seven times the money which it allegedly spent on exploring the project.

# Abruzzo says No to Dirty Oil

Due to its many national parks and nature reserves, the central Italian region of Abruzzo is one of Europe's greenest. Its coastline is dotted with bright beaches and ancient fishing villages leading up to hillside areas rich in vineyards, olive groves and small agricultural communities. For more than a decade the people of Abruzzo have fought to protect their pristine home from dirty oil drilling.

The community learned about the planned Ombrina Mare oil platform in April 2008. Just a few kilometres from shore a test well popped up, followed by an oil leakage a month later.[1] This test well was to pave the way for several wells, subsea pipelines and a 350 metre long floating refinery to desulphurise the low-quality oil. The platform would have spat out tonnes of toxic waste into the water and atmosphere every day.[2]

> **The citizens of Abruzzo spent hundreds of millions of euros on agriculture, fishing and to promote tourism. Those investments cannot be sacrificed for… the extractive industry.**
>
> **CARLO CONSTANTINI, FORMER MEMBER OF THE ABRUZZO REGIONAL COUNCIL**[3]

The threat of an offshore oil rig so close to the coast sparked immediate opposition. The local Catholic Church, several coastal municipalities, the province of Chieti, tourist operators, wine-growers, doctors, fisherfolk, environmental groups and many others opposed the project. Concerns were varied, including those related to disturbance of the fragile eco-system and wildlife (due to the drilling, constant noise pollution, potential oil spills etc), people's health (because of the release of toxic bi-products from oil extraction), earthquake risks, the future of tourism and the project's incompatibility with the local fishing industry.[4]

Under the "No Ombrina" slogan, thousands took to the streets in Abruzzo against the proposed oil rig. In May 2013 40,000 people protested in the city of Pescara. The demonstration was supported by numerous civil society groups, 3 dioceses, staff of 3 national parks, 47 local municipalities and by people across the region. In May 2015 60,000 citizens marched in Lanciano, a town whose population is about half that size. According to Matteo Cernison from the European University Institute "the entire regional society seemed to be mobilised against Ombrina".[5]

> **What are you going to tell your kids, your families? That you made money by bullying a peaceful community? That you don't give a damn about climate change and that while the entire planet is talking about keeping fossil fuels in the ground, you have the gall to come to a foreign country and forcefully drill?**
>
> **MARIA D'ORSOGNA, NO OIL ABRUZZO CAMPAIGN, IN AN OPEN LETTER TO ROCKHOPPER INVESTORS**[6]

The pressure worked. One politician after another, from across the political spectrum, spoke out against Ombrina Mare. In December 2015 the Italian Parliament approved a ban on oil and gas projects within twelve nautical miles of the Italian coast.[7] Ombrina Mare – like other offshore fossil fuel projects – was thus outlawed. In February 2016, the Ministry of Economic Development told Rockhopper that it would not receive the required production concession.

# Public money to compensate for hypothetical private profits

Rockhopper had bought the Ombrina Mare license in the midst of mounting rage against the project in the summer of 2014 (via a takeover of Mediterranean Oil & Gas, the previous license holder). So, the company must have been well aware that the project not only lacked several approvals, but also suffered from a lack of public and political support.[8] And yet, Rockhopper announced in March 2017 that it had challenged Italy's refusal to grant the concession in an arbitration tribunal and had "strong prospects of recovering very significant monetary damages... on the basis of lost profits."[9]

According to the company's boss, Rockhopper is not just claiming compensation for the money which it actually spent on exploring Ombrina Mare (US$40-50 million). It also wants an additional US$200-300 million for hypothetical profits the oil field could have made had it not been banned.[10] While many countries' constitutions do not consider anticipated profits to be protected private property, in investor-state disputes companies regularly receive compensation for alleged lost future profits.[11]

> **We've initiated arbitration proceedings to claim... at least all of the costs spent... which is in the region of 40 to 50 million dollars, but ideally (also) the profits, that we would have made had we been able to develop the field.... The lost profits might easily add up to 200 or 300 million dollars.**
>
> **SAM MOODY, ROCKHOPPER CHIEF EXECUTIVE**[12]

The company's legal costs are fully funded by UK litigation funder Harbour, who will cash in a share of the eventual award (see box 12 on page 64 for more information on such funding arrangements). In the words of Sam Moody, Rockhopper Chief Executive: "That process is costing us nothing."[13] The fact that the claim is backed by a deep pocketed financier however, might well put extra litigious heat on the government to settle the case – and drive up the costs to Italian taxpayers.

# Dirty Energy's secret weapon to undermine the energy transition

Rockhopper's lawsuit is based on the Energy Charter Treaty (ECT, see box 11 on page 58), even though Italy had withdrawn from it before the suit was filed. This is possible because of the deeply anti-democratic 'survival', or 'zombie', clause in investment agreements, which allows the corporate privileges to live on even after a country has withdrawn from the agreement. For any investments made before Italy's ECT withdrawal took effect (1 January 2016) it can still be sued for twenty years (until 1 January 2036). So, despite having exited the ECT, Italy could still be subject to many more Rockhopper-style legal attacks.

Indeed after Italy temporarily suspended new oil and gas permits in February 2019, lawyers who make money through investment arbitrations actually advertised Rockhopper's claim as a "benchmark for future cases" by other fossil fuel companies.[14]

> **Providing fossil fuel corporations with ISDS... is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield.**
>
> **KYLA TIENHAARA, QUEEN'S UNIVERSITY, CANADA**[15]

Investor-state dispute settlement (ISDS) is thus clearly a powerful tool in the hands of big oil, gas and coal companies to discourage governments from transitioning to clean energy. Climate scientists agree that three quarters of the world's fossil fuels need to stay in the ground if we do not want to destroy the planet.[16] But governments which halt dirty coal pits, gas pipelines or oil rigs in response to these concerns could be held liable for millions, if not billions, in damages – for decades to come.

BOX 11

# Meet the world's most dangerous investment agreement: the Energy Charter Treaty (ECT)[17]

The ECT is an international agreement from the mid-1990s, which applies to around 50 countries stretching from Western Europe through Central Asia to Japan. Under the treaty foreign investors can sue governments over measures taken in the energy sector that they consider harmful to their profits.

For example, Swedish energy giant Vattenfall has sued Germany over environmental restrictions on a coal-fired power plant. The company's second claim against Germany – a €6.1 billion challenge to the country's exit from nuclear power – has been going on since 2012 and had, by April 2019, led to over €16.6 million in legal defence costs for German taxpayers.[18] In April 2019, a Swiss company behind the controversial Nord Stream 2 gas pipeline from Russia to Germany threatened to file the first known ECT claim against the EU, which is also a party to the treaty.[19]

Globally, no trade and investment agreement has triggered more investor-state lawsuits than the ECT. In May 2019, a total of 122 corporate claims under the ECT were known of publicly.[20] Given the opacity of the system and the lack of public information, the actual number could potentially be much higher.

Worryingly, in spite of its risk to public budgets and governments' policy space to protect people and the climate, many countries in Africa, the Middle East, Asia and Latin America are in the process of signing up to the ECT with its dangerous investor privileges.

# References


1 Maria D'Orsogna: My oil story, 23 September 2018, unpublished draft, on file with the authors, 5-6.
2 Cernison, Matteo: The No Ombrina/No Triv protests in Abruzzo: organisational models and scales of action, Cosmos Working Paper, 2016, 9-10; Maria D'Orsogna: From the American leader of the NoOilAbruzzo campaign to Rockhopper investors, Save the Montepulciano D'Abruzzo blog, 21 January 2016.
3 Quoted in: No More Spills: Oil Companies Face Protests Over Drilling Plans in Italy.
4 See several 2010 entries on the Save the Montepulciano D'Abruzzo blogpost run by Maria D'Orsogna.
5 Cernison, Matteo: The No Ombrina/No Triv protests in Abruzzo: organisational models and scales of action, Cosmos Working Paper, 2016, 10-11.
6 Maria D'Orsogna: From the American leader of the NoOilAbruzzo campaign to Rockhopper investors, Save the Montepulciano D'Abruzzo blog, 21 January 2016.
7 A previous ban on oil concessions near the Italian coast from 2010 had been overturned in 2012, following lobbying by the oil industry. The re-introduced ban was part of the 2016 Budget Law (Law no. 208) of 28 December 2015.
8 Danilo Ruggero Di Bella: Rockhopper vs Italy: Weighing Legitimate Expectations Up Against Investor's Due Diligence in M&A Deals, Kluwer Arbitration Blog, 27 January 2018.
9 Rockhopper Exploration: Commencement of international arbitration, 23 March 2017. The claim (Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14) was registered in May 2017.
10 Quoted from video-taped presentation Rockhopper Exploration CEO Sam Moody Presents to investors at the Oil Capital Conference, 11 September 2017, starting at minute 19'00.
11 Under German law, for example, no compensation is granted for lost future profits. See: Markus Krajewski and Rhea Tamara Hoffmann: The European Commission's Proposal for Investment Protection in TTIP, 2016, 11.
12 Quoted from video-taped presentation Rockhopper Exploration CEO Sam Moody Presents to investors at the Oil Capital Conference, 11 September 2017, starting at minute 19'00.
13 Ibid, starting at minute 20'00.
14 Danilo Ruggero Di Bella and Josep Gálvez: Oil & Gas: Is Italy Doing It Wrong All Over Again?, Kluwer Arbitration Blog, 13 March 2019.
15 Kyla Tienhaara: Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement, Transnational Environmental Law, 7:2, July 2018, p250.
16 See for example: Christophe McGlade and Paul Ekins: The geographical distribution of fossil fuels unused when limiting global warming to 2°C, Nature, No. 517, January 2015, 187-90.
17 For references and more information, see https://www.energy-charter-dirty-secrets.org/.
18 Bundesministerium für Wirtschaft & Energie: Schriftliche Frage an die Bundesregierung im Monat März 2019. Fragen Nr. 482, 1.
19 Anca Gurzu: Nord Stream 2 threatens to take EU to court over gas rules, Politico, 23 April 2019.
20 Energy Charter Secretariat: List of all Investment Dispute Settlement Cases. Accessed 22 May 2019.


**Photo credits**

p55 (background) Maury, (foreground top) Histonium.net, (foreground bottom) Nuovo Senso Civico
p56 (top) Nicholas Gemini, (bottom) Engin Akyurt
p58 Enrico Pighetti


This case is part of the report *Red carpet courts: 10 stories of how the rich and powerful hijacked justice*, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, June 2019. **www.10isdsstories.org**